Study F/L-521.1 November 1, 1993

Memorandum 93-49

Effect of Joint Tenancy Title on Marital Property: Draft of Final Recommendation

Attached to this memorandum is a draft of the final recommendation on the effect of joint tenancy title on marital property. The draft incorporates changes made by the Commission at the September 1993 meeting, as well as a few technical improvements suggested by Professor Ed Halbach (who has sent the staff a memo with his notes on various details of the statute).

The draft also includes analysis of a number of significant suggestions made by Professor Halbach and by Judge Arnold H. Gold, supervising judge of the Los Angeles County Superior Court's probate division (Exhibit pp. 1-2). See discussion in Staff Notes following sections 683, 862, 864, 867, and 2581 of the draft. These are important points, and the Commission should read them with care.

Judge Gold disagrees with the basic approach of the recommendation. He believes the proposed legislation will thwart the parties' desire for an automatic right of survivorship in the majority of cases. He thinks that in many cases property held in joint tenancy title form will not satisfy the transmutation requirement. In this case he doubts that a title company would accept a simple affidavit of death from a spouse alleging it's community property when the title says joint tenancy.

The staff thinks Judge Gold's point is critically important and must be addressed. There will undoubtedly be many cases where property held in joint tenancy form does not use the statutory form and it will be unclear to a title company, transfer agent, or other person dealing with the property how it is to be treated. Third persons need to be able to know what to do with it, short of throwing up their hands and holding the property until a court order sorts out the rights of the parties. Professor Halbach makes the same point, noting that we should have BFP protection for something that looks like a valid transmutation but turns out not to be.

We think the joint tenancy statute needs a provision similar to those we have put in other statutes dealing with property that passes outside of probate—a

third person can assume that title means what it says and can deal with the property on that basis, leaving the parties and their successors to sort out contrary beneficial interests among themselves. We would add a provision to spell this out.

> **§ 868. Reliance on joint tenancy form of title**
>
> 868. Notwithstanding any other provision of this chapter, if property is held between married persons in joint tenancy form, a person may act in reliance on the apparent joint tenancy ownership during the marriage and on the apparent right of survivorship on death of a spouse, whether or not community property or separate property is properly transmuted under this chapter to joint tenancy, unless the person has actual or record notice of a contrary claim of interest in the property.
>
> **Comment.** Section 868 facilitates transfer of property held in joint tenancy form notwithstanding any community property and separate property rights of the spouses. The provisions of this chapter governing the effect of joint tenancy title on marital property are relevant only to controversies between married persons and their successors and do not generally affect third parties. However, a third party that has actual notice by reason of a claim or court order or other means may not rely on the joint tenancy title form, nor may a third party that has constructive notice by means of a recorded claim of interest in the property.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

PROBATE DEPARTMENT
The Superior Court
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012

ARNOLD H. GOLD
SUPERVISING JUDGE

TELEPHONE
(213) 974-1234

(by facsimile transmission and mail)

September 22, 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Attention: Mr. Nathaniel Sterling
Executive Secretary

Re: California Law Revision Commission September 1993 Draft Recommendation:
"Effect of Joint Tenancy Title on Community Property"

Ladies and Gentlemen:

I am the Supervising Judge of the Probate Department of the Los Angeles Superior Court. It is my understanding that our Court handles somewhere between one-third and forty percent of all of the probate matters in California.

I have reviewed the above-described September 1993 draft recommendation. I am writing to express views on the draft recommendation. Since this matter has just come to my attention and I have not had the opportunity to seek permission to speak on behalf of the Court, the views expressed in this letter are my personal views and do not reflect an official position taken by the Court.

1. Whatever you do on the more fundamental subject discussed in paragraph 2 below, I urge you to delete the second paragraph of the comment to section 867 (appearing at the bottom of page 11 of my copy of the draft recommendation). While almost anything "is arguable," I respectfully believe that it is absolutely clear that an argument that the law under existing cases and statutes is the same as that recommended by the draft recommendation would be dead wrong. That recommended legislation clearly changes the law.

The reason why it is so important to delete the second paragraph of the comment to proposed section 867 is because it will be used as authority for the proposition that the law has always been that which the recommended legislation would establish for the

future. Were courts to so hold, in substance the legislation's changes will have been made retroactively and cause enormous upheaval and an enormous quantity of litigation over property rights that the public had thought were settled.

I respectfully submit that the subject paragraph is at most a subject of theoretical debate and serves no useful purpose in the legislation. The paragraph can be dropped and the legislation will still have the same effect prospectively. However, if the paragraph is retained, it may lead to the legislation having an unintended retroactive effect.

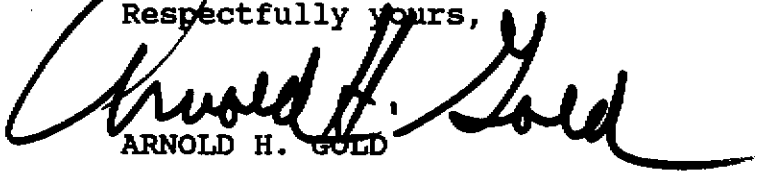
2. On a broader matter, I respectfully disagree with the basic approach of the September 1993 draft recommendation. I believe that the draft recommendation's approach will more frequently defeat the parties' intention than achieve that intention. There are of course conceptual difficulties with the proposition that property which is in joint tenancy can also be community property. However, I believe that in this day and age, the automatic survivorship feature of joint tenancy is so commonly understood by persons owning property that the need for the drastic shift which the draft recommendation would effect is far outweighed by the frequency with which parties' desire for automatic survivorship would be frustrated by their failure to adhere precisely to the stringent requirements of proposed section 863.

Furthermore, the proposed legislation does not address how title will be cleared in situations (frequent situations, I submit) in which the deed recites that it conveys title in joint tenancy but the precise language required by section 863 is not used. The simple process of recordation of an affidavit of death of joint tenant obviously would be inappropriate, because the effect of the recommended legislation would be that the property is not joint tenancy property. And I cannot believe that a title company will clear title by the simple recordation of an "affidavit of death of person holding community property interest" where the record title contains "joint tenancy" language. I predict that the title-clearing process will be costly and time-consuming to the public and add appreciably to court caseloads.

In summary, I have little problem with the law as it now exists, and I believe that the approach utilized in the September 1993 draft recommendation would frustrate substantially more intentions and cause substantially more litigation than adherence to the approach of existing law.

Thank you for your consideration of this letter.

Respectfully yours,



ARNOLD H. GOLD

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#F/L-521.1

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

RECOMMENDATION

Effect of Joint Tenancy Title on Marital Property

November 1993

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

SUMMARY

Historically in California married persons have taken title to their community and separate property in joint tenancy form unaware of the adverse consequences of that form of tenure, including the inability to will it or to obtain community property tax benefits. On the death of a spouse the survivor frequently has needed to make a showing that the joint tenancy title was for convenience only and there was no intent to convert the community property or separate property of a spouse to joint interests in separate property. In recent years this informal arrangement has broken down as courts have given greater effect to the form of title and the Internal Revenue Service has refused to recognize community property claims for property titled as joint tenancy unless evidenced by a written agreement.

This recommendation is intended to ensure that married persons who take title to property as joint tenants do so knowingly and intentionally. In order to convert community property or separate property of a spouse to joint interests in separate property, the spouses must transmute the property by an express written declaration; otherwise it retains its original character. The recommendation includes a statutory form that informs married persons of the advantages and disadvantages of community property, separate property, and joint tenancy. The statutory form also includes a proper declaration to enable the married persons to transmute community property or separate property of a spouse to joint interests in separate property, if desired. The statutory presumption that community property and separate property of a spouse retain their original character unless transmuted to joint tenancy would apply prospectively to property titled in joint tenancy after the operative date of the statute.

EFFECT OF JOINT TENANCY TITLE ON MARITAL PROPERTY

A husband and wife in California may hold property together in joint tenancy or as community property.[1] The two types of tenure, one common law and the other civil law, have different legal incidents — the spouses have different management and control rights and duties, creditors have different rights to reach the property, and the property is treated differently at dissolution of marriage and at death.[2]

In California it is common for husband and wife to take title to property in joint tenancy form even though the property is acquired with community funds or with separate property of a spouse. Frequently the joint tenancy title form is selected by the spouses on the advice of a broker or other person who is unaware of the differences in legal treatment between the types of property tenure. The spouses themselves ordinarily do not know the differences between the types of tenure, other than that joint tenancy involves a right of survivorship.[3]

A person who is adversely affected by the joint tenancy title form may subsequently attempt to prove that the spouses did not intend to transmute the community property into joint tenancy. Because joint tenancy is often disadvantageous to the spouses,[4] the courts in the past have been liberal in relaxing evidentiary rules to allow proof either that the spouses did not intend to transmute community property or separate property of a spouse to joint interests in separate property or, if they did, that they subsequently transmuted it back.[5]

The result has been general confusion and uncertainty in this area of the law, accompanied by frequent litigation[6] and negative critical comment.[7] It is apparent

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1. Fam. Code § 750. The spouses may also hold property as tenants in common, although this is relatively infrequent.

2. *See, e.g.*, Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L.J. 927 (1983), *reprinted in* 10 Comm. Prop. J. 157 (1983).

3. *See, e.g.*, Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 Hastings L.J. 769, 830 & n.239, 832 n. 242, 833 & n. 245 (1982); Sterling, *supra*, 14 Pac. L.J. at 928-29, *reprinted in* 10 Comm. Prop. J. at 158-59.

4. Joint tenancy may frustrate the decedent's will or trust or other estate plan and result in adverse tax consequences if the property has appreciated in value. See discussion below.

5. See also discussion in Reppy, *Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage*, 18 San Diego L. Rev. 143, 159-68 (1981).

6. *See, e.g.*, Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003 (1932); Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513 (1932); Tomaier v. Tomaier, 23 Cal. 2d 754, 146 P.2d 905 (1944). Cases struggling with the issue in the past few years include *In re* Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980); Estate of Levine, 125 Cal. App. 3d 701, 178 Cal. Rptr. 275 (1981); *In re* Marriage of Stitt, 147 Cal. App. 3d 579, 195 Cal. Rptr. 172 (1983); Estate of Blair, 199 Cal. App. 3d 161, 244 Cal. Rptr. 627 (1988); *In re* Marriage of Allen, 8 Cal. App. 4th 1225, 10 Cal. Rptr. 2d 916 (1992), *review granted*, 13 Cal. Rptr. 2d 474 (1992), *review dismissed as improvidently granted, cause remanded to Ct. App. for entry of judgment. conforming to prior opin.*, 16 Cal. Rptr. 2d 181 (1993) ; *In re* Marriage of Hilke, 4 Cal. 4th 215 (1992).

7. See, e.g., Marshall, *Joint Tenancy Taxwise and Otherwise*, 40 Calif. L. Rev. 501 (1952); Griffith, *Community Property in Joint Tenancy Form*, 14 Stan. L. Rev. 87 (1961); Mills, *Community Joint Tenancy–A Paradoxical Problem in Estate Administration*, 49 Cal. St. B.J. 38 (1974); Reppy, *supra* note 5; Bruch, supra note 3; Sterling, supra note 2; Kasner, *Community Property in Joint Tenancy Form: Since We Have It, Lets Recognize*

that the interrelation of community property, separate property, and joint tenancy requires clarification.

Legislation enacted in 1965 directly addressed the problem of married persons taking title to property in joint tenancy form without being aware of the consequences and in fact believing the property is community.[8] Former Civil Code Section 5110 was enacted to provide that a single-family residence acquired during marriage in joint tenancy form is presumed community property for purposes of dissolution of marriage. This presumption had a beneficial effect and was expanded in 1983 to apply to all property acquired during marriage in joint tenancy form.[9] The 1983 legislation also made clear that the community property presumption may be rebutted only by a clear writing by the spouses, but that separate property contributions are reimbursable at dissolution of marriage.[10] This legislation is limited in effect and does not address treatment of the property at death of a spouse,[11] or during marriage before dissolution or death.

Community property provides a married person important protections that a joint tenancy of separate property interests does not. Community property protections include:

(1) Fiduciary duties in management and control of the property.[12]

(2) Limitations on depletion of the community by gift.[13]

(3) Limitations on disposition of the family home or other community real property.[14]

(4) Prohibition on forced partition of the property during marriage.[15]

(5) Right to will the decedent's community property interest.[16]

(6) Stepped-up income tax basis for appreciated community property share of the surviving spouse.[17]

Joint tenancy provides greater protection than community property from liability for debts of a married person, both during the marriage and after the death

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It (on file with California Law Revision Commission 1991); Petrulis, *Joint Tenancy: A Mere Form of Title,* 12 Estate Planning, Trust & Probate News, No. 4 at p.8 (State Bar of California 1992).

8. Cal. Assem. Int. Comm. on Judic., Final Report relating to Domestic Relations, *reprinted in* 2 App. J. Assem., Cal. Leg. Reg. Sess. 122-25 (1965).

9. Civ. Code § 4800.1, enacted by 1983 Cal. Stat. ch. 342, § 1, *repealed by* Assembly Bill No. 2650, 1992 Cal. Stat. ch. 162, § 3, operative Jan. 1, 1994 (retaining much of former § 4800.1 as Family Code § 2580). See California Law Revision Commission — Report Concerning Assembly Bill 26, 1983 Sen. J. 4865 (1983).

10. Civ. Code § 4800.2, enacted by 1983 Cal. Stat. ch. 342, § 2, *repealed by* Assembly Bill No. 2650, 1992 Cal. Stat. ch. 162, § 3, operative Jan. 1, 1994 (retaining much of former § 4800.2 as Family Code § 2640).

11. *In re* Marriage of Hilke, 4 Cal. 4th 214, 14 Cal. Rptr. 2d 371, 375 (1992).

12. Fam. Code §§ 721, 1100(e), 1101.

13. Fam. Code § 1100(b).

14. Fam. Code § 1102.

15. Code Civ. Proc. § 872.210(b).

16. Prob. Code § 6101.

17. Int. Rev. Code § 1014.

of a spouse.[18] During the marriage the debts of a spouse may only be satisfied out of the spouse's one-half interest in joint tenancy, and after the spouse dies the survivor may take the one-half interest free of the spouse's debts. However, the common law protection against debts is at the expense of a creditor who may be denied payment for a just debt. Moreover, the limitation on liability of joint tenancy property may cause a joint tenant to be allowed credit only with the signature of the other joint tenant and only subject to a security interest in the joint tenancy property. By comparison, the statute governing liability of community property for debts represents deliberate social policy based on a balanced consideration of all aspects of the debtor-creditor relationship, including the need for fairness to all parties and to encourage extension of credit to married persons.[19]

Other arguments that have been advanced for the desirability of joint tenancy for married persons also are problematic:

• Depreciated joint tenancy property retains a higher income tax basis than depreciated community property. However, this is relatively unimportant since the vast majority of decedents' property in California has appreciated rather than depreciated in value, and community property receives a substantial tax advantage in this situation.

• Joint tenancy property may appear to pass automatically to the surviving spouse at death. But either spouse may unilaterally sever the joint tenancy and devise the spouse's interest in the property. This is comparable to community property, which passes to the surviving spouse unless devised by the decedent.[20]

• Automatic passage to the surviving spouse under joint tenancy may, and frequently does, frustrate a well-conceived estate plan that seeks to pass the decedent's share of the property, for example, to a bypass trust or a child of a former marriage. Under community property tenure this unfortunate situation cannot occur.

• The ability to clear title quickly by affidavit of death is an important characteristic of joint tenancy property that is also a feature of community property. Community property passes to the surviving spouse without probate,[21] although the surviving spouse may elect probate if desired.[22] Clear title to community property may be established by affidavit of death.[23]

The statutory incidents of community property that have been enacted over the years for the protection of married persons correspond with what most married

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18. See discussion in Sterling, *supra* note 2, 14 Pac. L.J. at 945-51, *reprinted in* 10 Comm. Prop. J. at 175-182.

19. California Law Revision Commission, *Recommendation relating to Liability of Marital Property for Debts*, 17 Cal. L. Revision Comm'n Reports 1 (1983).

20. Prob. Code § 6401.

21. Prob. Code § 13500.

22. Prob. Code § 13502.

23. Prob. Code § 13540.

persons want and expect. They are generally advantageous to married persons. Joint tenancy ill-serves the needs of most married persons, despite its wide-spread but uninformed use.

Joint tenancy also has a serious impact on a married person's separate property. Transmutation of separate property of a spouse to joint tenancy title causes an immediate and irrevocable gift to the other spouse of half the person's separate property, which cannot be recovered at termination of marriage by dissolution or death.

For these reasons, the Law Revision Commission recommends that the law should ensure that married persons who take title as joint tenants do so knowingly and intentionally.

In order to convert community property or separate property of a spouse to joint interests in separate property, the spouses should make an express and knowing transmutation of the property.[24] A statutory form should be enacted with sufficient information and a proper declaration to enable a person to transmute community property to joint tenancy, if that is what is really desired. A person who assists married persons in titling their property should be protected from liability for any harm that may result if the person provides them a copy of the statutory form. Failure to execute a proper declaration of a knowing and intentional transmutation of community property or separate property of a spouse

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24. This is analogous to the "Acceptance of Joint Tenancy" in use in Arizona. The requirement would apply to both community property and separate property.

The transmutation statute is found at Family Code Sections 850-853:

850. Subject to Sections 851 to 853, inclusive, married persons may by agreement or transfer, with or without consideration, do any of the following:

(a) Transmute community property to separate property of either spouse.

(b) Transmute separate property of either spouse to community property.

(c) Transmute separate property of one spouse to separate property of the other spouse.

851. A transmutation is subject to the laws governing fraudulent transfers.

852. (a) A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected.

(b) A transmutation of real property is not effective as to third parties without notice thereof unless recorded.

(c) This section does not apply to a gift between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that is used solely or principally by the spouse to whom the gift is made and that is not substantial in value taking into account the circumstances of the marriage.

(d) Nothing in this section affects the law governing characterization of property in which separate property and community property are commingled or otherwise combined.

(e) This section does not apply to or affect a transmutation of property made before January 1, 1985, and the law that would otherwise be applicable to that transmutation shall continue to apply.

853. A statement in a will of the character of property is not admissible as evidence of a transmutation of the property in a proceeding commenced before the death of the person who made the will.

to joint interests in separate property should leave the character of the property unaffected.[25]

The community property and separate property presumptions correspond with the probable intent of most married persons[26] as well as with the probable effect of existing statute and case law.[27] However, the presumptions should be applied prospectively only, due to the possibility that some existing joint tenants may have relied on the law in effect at the time the property was subjected to the joint tenancy title.[28]

The proposed statutory scheme corresponds with the intention of most married persons not to lose basic community property protections and separate property rights merely by taking property in joint tenancy title form, while enabling those who really want joint tenancy treatment to obtain it. The proposed law will provide certainty and minimize litigation over the issue whether the property should be treated as community property, separate property of a spouse, or joint interests in separate property.

Treating the property as community at death enables passage at death to the surviving spouse without probate. Title to the property can be cleared quickly and simply either by affidavit[29] or by summary court proceeding.[30] It also avoids possible frustration of the decedent's estate plan since the community property may be passed by will (for example, to an exemption-equivalent testamentary bypass trust, with resultant tax savings for survivors).

In short, community property tenure is more advantageous to the parties than joint tenancy in the ordinary case, and corresponds to the ordinary expectations of the parties who take title in joint tenancy form. The law should be clear that community property in joint tenancy form receives community property treatment

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25. The law applicable to commingling, tracing, reimbursement, gift, and other principles affecting separate property contributions to community property or joint tenancy would be unaffected unless a valid transmutation is made. *See, e.g.*, Fam. Code § 2640 (separate property contributions to property acquisition).

26. The Law Revision Commission has consulted with a number of estate planning experts active in state and local bar associations. Their experience is that most married persons, when fully informed of the differences in treatment between community property and separate property held as joint tenants, indicate a preference and intent that the property remain community.

27. The requirement in Family Code Section 852 (formerly Civil Code Section 5110.730) of an express declaration in writing to transmute community property to separate property may negate the effect of many joint tenancy titles and leave unaffected the character of property having a community property source. See discussion in Kasner, *supra* note 7; Petrulis, *supra* note 7, at 8.

28. This is not a constitutional issue. Retroactivity of a statutory community property presumption for property in joint tenancy form would be validated by Marriage of Hilke, 14 Cal. Rptr. 2d 371 (1992) (a joint tenancy survivorship right is not a vested right before the death of a joint tenant). In any event it is likely that the effect of existing statute and case law, at least as of January 1, 1985 (the effective date of the transmutation statute), is the same as that proposed in this recommendation — community property and separate property remain community and separate unless transmuted to joint interests in separate property. See note 27, *supra*.

29. Prob. Code §§ 210-212; see also Prob. Code § 13540 (right of surviving spouse to dispose of real property).

30. Prob. Code §§ 13650-13660.

for all purposes, unless the parties clearly indicate in writing their intent to hold their interests as joint tenants in separate property.

RECOMMENDED LEGISLATION

Civ. Code § 683 (amended). Creation of joint interest

SECTION 1. Section 683 of the Civil Code is amended to read:

683. (a) A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, ~~or by transfer from~~ including but not limited to a transfer:

(1) From a sole owner to himself or herself and others ~~, or from~~ .

(2) From tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others ~~, or from~~ .

(3) From a husband and wife, when holding title as community property or otherwise to themselves or to themselves and others or to one of them and to another or others ~~, when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants~~ .

(b) A joint tenancy in personal property may be created by a written transfer, instrument, or agreement.

~~(b) Provisions of this section do~~

(c) This section is subject to Chapter 6 (commencing with Section 860) of Part 2 of Division 4 of the Family Code (effect of joint tenancy title on marital property).

(d) This section does not apply to a joint account in a financial institution if Part 2 (commencing with Section 5100) of Division 5 of the Probate Code applies to ~~such~~ the account.

Comment. Section 683 is amended to recognize enactment of Family Code Sections 860-867, governing the effect of joint tenancy title on real and personal marital property.

The reference in the section to a grant or devise to executors or trustees as joint tenants is deleted. Rights and duties among joint executors and cotrustees are governed by statute and not by the law of joint tenancy. See Prob. Code §§ 9630-9631 (joint personal representatives), 15620-15622 (cotrustees).

The other changes in the section are technical, for organizational purposes.

Note. *Professor Halbach suggests that we consider replacing subdivisions (a) and (b) with a broader and simpler provision along the following lines:*

> (a) A joint tenancy in real or personal property may be created by a will, deed, or other written instrument of transfer, ownership, or agreement if the document expressly declares that the property is to be held in joint tenancy.

The staff is sympathetic to this suggestion. However, we are wary about trying to do too much in one narrowly focused recommendation. It is likely that no harm would come of this revision, although we would be deleting aspects of it that purport to codify some of the common law incidents of joint tenancy—form of tenure of two or more persons, equal ownership, types of conveyances, etc. Professor Halbach's suggestion is that the Comment simply note that these common law aspects of joint tenancy are not affected. The Comment could also refer to other common law and statutory aspects of joint tenancy.

However, some of the existing provisions may be in derogation of the common law which, unlike this section, favors joint tenancy as a form of tenure. We would not feel comfortable making the change without first reviewing the extensive annotations to this section. Moreover, the provision is one of a sequence in the Civil Code that uses consistent terminology, and is

referred to by other statutes in its current terminology. To change this one without making conforming changes in the others could cause confusion.

Although we would like to clean up this section as Professor Halbach suggests, we are not sure that it causes any problems as it stands, nor are the benefits of a cleanup apparent, although Professor Halbach indicates that its breadth and simplicity will have other incidental advantages. Professor Halbach's general feeling is that we should not feel rushed to wrap up this project but should take the time to do it right.

Fam. Code §§ 860-867 (added). Effect of joint tenancy title on marital property

SEC. 2. Chapter 6 (commencing with Section 860) is added to Part 2 of Division 4 of the Family Code, to read:

CHAPTER 6. EFFECT OF JOINT TENANCY TITLE ON MARITAL PROPERTY

§ 860. Scope of chapter

860. This chapter applies to real and personal property held between married persons in joint tenancy form, regardless of whether the property is acquired in whole or part with community property or separate property or whether the form of title is the result of an agreement, transfer, exchange, express declaration, or other instrument or transaction that affects the property.

Comment. Sections 860 to 867 govern the effect of joint tenancy title on marital property. A husband and wife may hold property as joint tenants (or tenants in common) or as community property. Section 750. Joint tenancy (or tenancy in common) is a form of separate property ownership and is inconsistent with community property. *See, e.g.*, Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003 (1932). *See, generally*, discussion in Sterling, *Joint Tenancy and Community Property in California*, 14 Pac. L.J. 927 (1983), *reprinted in* 10 Comm. Prop. J. 157 (1983). See also Section 865 (effect of transmutation to joint tenancy).

Section 860 applies this chapter to all marital property held in joint tenancy form, whether the property has a community property source, a separate property source, or a mixed community property and separate property source. Thus to the extent joint tenancy tenure is imposed on the property under this chapter, this chapter governs treatment of separate property contributions and overrides prior law applicable to commingling, tracing, reimbursement, gift, and other principles affecting separate property and community property rights. *Cf.* Section 2581 (community property presumption for property held in joint form).

This chapter applies to personal property as well as real property. See also Section 760 (community property).

§ 861. Marital property presumptions notwithstanding joint tenancy title

861. (a) If married persons hold property in joint tenancy form:

(1) To the extent the property has a community property source it is presumed to be community property.

(2) To the extent the property has a separate property source it is presumed to be separate property, subject to commingling, tracing, reimbursement, gift, and other principles affecting separate property.

(b) The presumptions established by this section are presumptions affecting the burden of proof and are rebuttable only pursuant to Section 862.

Comment. Section 861 resolves the conflict in the case law among the presumptions that (1) property acquired by the spouses during marriage is community property, (2) property held by the spouses during marriage retains the community or separate characterization of its source, and (3) joint tenancy title means what it says. Under Section 861, when these presumptions conflict, the community property and source presumptions prevail over the title presumption. These presumptions may be overridden only by proof of a transmutation to joint tenancy. See Section 862. The joint interests of married persons are their separate property. Section 864.

Under this section, community property that is not properly transmuted to joint tenancy remains community property for all purposes and receives community property treatment at death, including tax and creditor treatment and, if left to the surviving spouse by will or by intestacy, passage without probate (unless probate is elected by the surviving spouse). Section 865 (passage of marital property by affidavit of death without probate); see also Prob. Code § 13500. In the case of community real property that passes without probate, the surviving spouse has full power to deal with and dispose of the property after 40 days from the death of the spouse, and title to the property may be established by affidavit. Prob. Code § 13540.

Likewise, separate property of a spouse that is not properly transmuted to joint tenancy remains the separate property of the spouse and is subject to commingling, tracing, reimbursement, gift, and other principles affecting separate property.

§ 862. Transmutation of community or separate property to joint tenancy

862. The presumptions established by Section 861 may be rebutted only by proof of (1) an instrument in the form provided in Section 863 or (2) an instrument that otherwise satisfies Chapter 5 (commencing with Section 850) (transmutation of property) and includes an express declaration that the property or tenure is converted to joint tenancy or separate property held jointly, or words to that effect expressly stating that the characterization or ownership of the property is being changed. The instrument may be a part of a document of title or may be a separate instrument, and may be executed together with a document of title or at another time.

Comment. Section 862 makes clear that the transmutation statute governs creation of joint tenancy from community property or separate property. The spouses may transmute marital property to joint tenancy by agreement or transfer. Section 850. The joint interests of married persons are their separate property. Section 864. A transmutation of real or personal property is not valid unless done in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose existing interest in the property is affected. Section 852(a). A transmutation of real property is not effective as to third parties without notice of it unless recorded. Section 852(b).

Under this section an express declaration transmuting marital property to joint tenancy should state that the property or tenure is converted to joint tenancy or separate property held jointly, or words to that effect expressly stating that the character or ownership of the property is being changed. This requirement seeks to codify case law as applied to a transmutation to joint tenancy. *Cf.* Estate of MacDonald, 51 Cal. 3d 262, 271-72, 794 P.2d 911, 272 Cal. Rptr. 153 (1990). The express declaration requirement may be satisfied by use of the statutory form provided in Section 863.

Note. *We have combined former subdivisions (a) and (b) into one section, pursuant to a suggestion from Professor Halbach.*

§ 863. Statutory form

863. (a) An instrument transmuting community property or separate property of a married person to joint tenancy satisfies Section 862 if the instrument is made in writing by an express declaration substantially in the following form and signed by each spouse:

DECLARATION OF JOINT TENANCY

NOTICE

The Information in this Notice Is a Summary and Not a Complete Statement of the Law. You May Wish to Seek Expert Advice Before Signing this Declaration.

DO YOU WANT TO GIVE UP YOUR COMMUNITY PROPERTY AND SEPARATE PROPERTY RIGHTS IN THE PROPERTY DESCRIBED BELOW? If you sign this declaration the property will not be community property and you will give up half of any separate property interest you have in it. Some of the rights you will lose are summarized below.

Community Property.

You and your spouse own community property equally and the entire property is subject to your debts. You may pass your share of community property by will or put it in a trust, but otherwise it goes automatically to your spouse when you die and does not have to be probated. The surviving spouse gets an income tax benefit if the property has increased in value.

If you sign this declaration:

•Your community property is converted to joint tenancy, owned equally with your spouse.

•Your share may not be subject to your spouse's debts. However, this may limit your ability to get credit without your spouse's signature.

•You cannot pass your share by will or put it in a trust as long as the joint tenancy remains in effect. When you die your share goes automatically to your spouse without probate. Your spouse will get an income tax benefit only if the property has decreased in value.

Do **not** sign this declaration if you want community property. Instead, you should take title as community property.

Separate Property.

You own your separate property absolutely and have full power to manage and dispose of it. If you sign this declaration you make an immediate and permanent gift of half your separate property to your spouse, which you cannot get back at dissolution of marriage and cannot pass by will or trust. When you die your remaining half interest in the property passes automatically to your surviving spouse without probate. You cannot give it by will or put it in a trust as long as the joint tenancy remains in effect.

Do **not** sign this declaration, and you should not take title as joint tenancy if you want to keep your separate property rights.

DESCRIPTION OF PROPERTY

The property that is the subject of this declaration is:

_____

Description of Property or Document of Title
or Other Instrument Creating Joint Tenancy Title

DECLARATION

We have read the Notice set out above and understand that we give up community and separate property rights by signing this declaration. We declare that we intend to transmute (convert) any community property and any separate property interest either of us has in the property that is the subject of this declaration to joint tenancy, owned by us in equal shares as the separate property of each of us, and to hold the property for all purposes as joint tenants and not as community property or as separate property of either of us alone.

Do Not Sign Unless You Have Read the NOTICE Set Out Above.

_____ _____
Signature of Spouse Date

_____ _____
Signature of Spouse Date

ACKNOWLEDGMENT

State of California)
County of _____)

On _____ before me, (here insert name and title of officer), personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____ (Seal)

(b) A person who provides a married person a copy of the form provided in this section is not liable for any injury that results from transmutation of community property or separate property of the married person to joint tenancy as a consequence of providing the form. Nothing in this section is intended to relieve

a person from liability for fraudulent or other improper use of the form provided in this section or from liability relating to advice given or an obligation to advise a married person concerning title.

(c) Nothing in this section limits or affects the validity of an instrument not substantially in the form provided in this section if the instrument otherwise satisfies Section 862.

Comment. Section 863 provides a "safe harbor" for the requirements of Section 862 (transmutation of marital property to joint tenancy). This section does not provide the exclusive means by which that section may be satisfied; any instrument that meets the standards in that section will satisfy it. Subdivision (c). However, use of the statutory form provided in Section 863 satisfies that section as a matter of law. Subdivision (a).

The express declaration provision of this section is consistent with requirements in Civil Code Section 683 ("express declaration" required for joint interest) and Family Code Section 852 ("express declaration" required for transmutation).

Execution of the acknowledgment is optional. If the declaration affects real property it ought to be acknowledged so it is recordable.

Subdivision (b) makes clear that a person, such as a broker, escrow agent, or other advisor, who provides a married person with a copy of the statutory form is immunized from any liability that might result from its use to cause a transmutation of marital property. The intent of the immunity provision is to discourage uninformed decision-making concerning joint tenancy title by encouraging use of the statutory form which contains useful title information. Subdivision (b) is not intended to relieve an advisor from any common law liability that may exist for improperly advising a married person concerning the form of title (advice that goes beyond merely providing a copy of the statutory form), or to excuse an advisor from any duty properly to advise a married person that may arise from an attorney-client or other relationship between the advisor and the married person.

§ 864. Effect of transmutation to joint tenancy

864. Transmutation of community property or separate property of a married person to joint tenancy changes the character and tenure of the property for all purposes from community property or from separate property of the married person to joint interests of the married persons in the property, the interest of each being the separate property of that joint tenant.

Comment. Section 864 makes clear that a transmutation of community property or separate property to joint tenancy results in a "true" separate property joint tenancy and not a hybrid form of tenure. Married persons may hold property as community property, or as joint tenants or tenants in common. Section 750 (methods of holding property); see also Comment to Section 861 (marital property presumptions notwithstanding joint tenancy title).

At dissolution of marriage the property is treated as separate property and not as community property. See Section 2581 (presumption concerning property held in coownership form). However, the property is subject to the court's jurisdiction at dissolution. Section 2650 (separate property held in coownership form).

Note. *This draft deletes a sentence formerly included in the section:*

> A severance of the joint tenancy results in a tenancy in common of the married persons in the property, the interest of each being the separate property of that tenant in common and not community property.

Professor Halbach points out that this sentence is misleading, since it assumes that the severance merely terminates the survivorship right without more, whereas in fact the severing document may do other things with the spouses' interests as well, including transmuting it back to community property.

This sentence is unnecessary; the law would give the correct result absent the sentence. We included it only to show IRS that this really is separate property and not a disguised form of community property, but the staff thinks it can be dispensed with for this purpose.

Professor Halbach suggests we may actually want to be innovative here and change the common law: a severance of joint tenancy between spouses converts the joint tenancy property to community property absent a contrary provision in the severing instrument. He thinks this will be the desired result in many cases in which one spouse is incompetent and the other spouse is attempting to implement their objectives, since the property will then receive community property tax treatment, and if the incompetent spouse is intestate it will still pass the same way as it would have under joint tenancy.

However, we would need to consider the impact of this proposal on other fact situations as well. Although the staff sees merit in Professor Halbach's suggestion, it will require too much elaboration for our present purposes (unless we decide to delay in order to further develop this recommendation).

§ 865. Passage of marital property by affidavit of death without probate

865. Notwithstanding joint tenancy form of title, property of married persons that is not properly transmuted under this chapter to joint tenancy remains subject to disposition on death of a spouse in the same manner as other community property and separate property of a spouse, including passage to the surviving spouse without necessity of estate administration and clearance of title by recorded affidavit of death to the extent and in the manner provided in Part 2 (commencing with Section 13500) of Division 8 of the Probate Code.

Comment. Section 865 is a specific application of the rule that if marital property is not properly transmuted to joint tenancy, it retains its character for all purposes. See Section 861 and Comment (marital property presumptions notwithstanding joint tenancy title). Section 865 serves to emphasize that for married persons joint tenancy does not offer a significant advantage over community property at death, since community property, like joint tenancy property, may pass to the surviving spouse without probate and title may be cleared by filing an affidavit of death. *See, e.g.*, Prob. Code §§ 13500 (no administration necessary), 13540 (affidavit of death).

§ 866. Effect on special statutes

866. Nothing in this chapter affects any other statute that prescribes the manner or effect of a transfer, inter vivos or at death, of property registered, licensed, or otherwise documented or titled in joint tenancy form pursuant to that statute.

Comment. Section 866 saves existing schemes governing transfer of title, probate and nonprobate, applicable to specified types of property. *See, e.g.*, Health & Safety Code § 18080 (coownership of manufactured home, mobilehome, commercial coach, truck camper, or floating home registration); Vehicle Code §§ 4150.5, 5600.5 (coownership vehicle registration). *Cf.* Civ. Code § 683 (creation of joint interest); Fam. Code § 2581 (community property presumption for property held in joint form); Prob. Code § 5305 (presumption that funds on deposit are community property).

§ 867. Transitional provision

867. (a) As used in this section, "operative date" means January 1, 1995.

(b) This chapter applies to property held between married persons in joint tenancy form as the result of an instrument that is executed or a transaction that occurs on or after the operative date.

(c) Property held between married persons in joint tenancy form as the result of an instrument that was executed or a transaction that occurred before the operative date is governed by the applicable law in effect at the time the instrument was executed or the transaction occurred.

Comment. Section 867 provides special transitional provisions for this chapter that are an exception to the general transitional provisions found in Section 4.

Note. *We have deleted from the Comment the following paragraph:*

> Under subdivision (c), this chapter does not apply to property acquired before the operative date. Nonetheless, it is arguable that the law under existing cases and statutes is the same as that provided in this chapter. See, e.g., Sections 760 (community property) and 852 (form of transmutation).

We have made this deletion at the urging of Judge Gold, who argues that this statement of what the existing law might be is absolutely wrong, and destroys our intention to apply the new law prospectively only. As we have seen, many lawyers and judges think they know what existing law provides, but few of them agree with each other. However, the staff acknowledges that the Comment language is gratuitous and should be deleted.

Fam. Code § 2581 (amended). Community property presumption for property held in joint form

SEC. 3. Section 2581 of the Family Code [as added by 1993 Cal. Stat. ch. 219, § 111.7] is amended to read:

2581. (a) For the purpose of division of property upon dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property is presumed to be community property. ~~This presumption~~

(b) The presumption established by subdivision (a) is a presumption affecting the burden of proof and may be rebutted by either of the following:

~~(a)~~ (1) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

~~(b)~~ (2) Proof that the parties have made a written agreement that the property is separate property.

(c) A declaration of joint tenancy under Chapter 6 (commencing with Section 860) of Part 2 of Division 4 (effect of joint tenancy title on marital property) satisfies subdivision (b).

Comment. Section 2581 is amended to recognize enactment of Sections 860-867, governing the effect of joint tenancy title on marital property. Under those provisions, community property and separate property in joint tenancy form retain their character without change unless there is an effective transmutation of the property. Section 861 (marital property presumptions notwithstanding joint tenancy title). Once transmuted, the property is separate property owned equally by the spouses for all purposes, but is subject to jurisdiction of the court at dissolution, as are all other forms of jointly held marital property. Section 2650 (jointly held separate property).

Note. *Professor Halbach believes that the proposed joint tenancy legislation conflicts with this and other statutes that provide that coowned marital property is treated as community property at dissolution, subject to a reimbursement right for the actual value of separate*

property contributions. He notes that the proposed joint tenancy legislation provides that marital property that is not properly transmuted to joint tenancy remains community or separate according to its source, which would yield a proportionate division rather than a reimbursement division at dissolution of marriage. He would like to see the proportionality rule of the joint tenancy legislation applied consistently to division at dissolution as well as for other purposes, or at least the conflict between the joint tenancy rule and the general dissolution rule should be resolved.

The staff agrees with Professor Halbach that the potential conflict in the statutes should be resolved. We do not intend to override the special rules for division of coowned property at dissolution of marriage, and we think it would be a mistake to do so. We suggest that the potential conflict be resolved by stating directly in the joint tenancy statute that rights at dissolution of marriage are governed by special statutes on that subject. Thus proposed Section 861 would be revised to read:

> 861. (a) If married persons hold property in joint tenancy form:
>
> (1) To the extent the property has a community property source it is presumed to be community property.
>
> (2) To the extent the property has a separate property source it is presumed to be separate property, subject to commingling, tracing, reimbursement, gift, and other principles affecting separate property.
>
> (b) The presumptions established by this section are presumptions affecting the burden of proof and are rebuttable only pursuant to Section 862.
>
> (c) The presumptions established by this section do not apply in any circumstances where the presumption established by Section 2581 (community property presumption for property held in joint form) would otherwise apply.
>
> **Comment.** Subdivision (c) makes clear that the community property and separate property presumptions for property held in joint tenancy form do not apply for purposes of division at dissolution of marriage. See Sections 2581 (community property presumption) and 2640 (reimbursement of separate property contributions).

Prob. Code § 5305 (amended). Presumption that funds on deposit are community property

SEC. 4. Section 5305 of the Probate Code [as amended by 1993 Cal. Stat. ch. 219, § 224.7] is amended to read:

5305. (a) Notwithstanding Sections 5301 to 5303, inclusive, if parties to an account are married to each other, whether or not they are so described in the deposit agreement, their net contribution to the account is presumed to be and remain their community property.

(b) Notwithstanding Sections 2581 and 2640 of, and Chapter 6 (commencing with Section 860) of Part 2 of Division 4 (effect of joint tenancy title on marital property) of, the Family Code, the presumption established by this section is a presumption affecting the burden of proof and may be rebutted by proof of either of the following:

(1) The sums on deposit that are claimed to be separate property can be traced from separate property unless it is proved that the married persons made a written agreement that expressed their clear intent that the sums be their community property.

(2) The married persons made a written agreement, separate from the deposit agreement, that expressly provided that the sums on deposit, claimed not to be community property, were not to be community property.

(c) Except as provided in Section 5307, a right of survivorship arising from the express terms of the account or under Section 5302, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation, may not be changed by will.

(d) Except as provided in subdivisions (b) and (c), a multiple-party account created with community property funds does not in any way alter community property rights.

Comment. Section 5305 is amended to make clear that the special transmutation provisions of Family Code Sections 860-867 for the effect of joint tenancy title on marital property are not applicable to community property in a multiple-party account. Property rights in such an account are governed by the special provisions of the California Multiple-Party Accounts Law and not by the general Family Code transmutation rules. See also Fam. Code § 866 (effect on special statutes).